

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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OFFICE OF THE SECRETARY

In the Matter of

MOBILEMEDIA CORPORATION, et al.

Applicant for Authorizations and Licensee
of Certain Stations in Various Services

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WT Docket No. 97-115

To: The Commission

**EMERGENCY PETITION FOR LIMITED
RECONSIDERATION OR CLARIFICATION**

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DECLARATION OF GENE A. DEJORDY

SUMMARY

Western Wireless Corporation ("Western") hereby petitions for limited reconsideration or clarification of the Commission's order in MobileMedia Corporation, FCC 97-197 (rel. June 6, 1997) ("Stay Order"), which, among other things, stayed the hearing designation order ("HDO") in the MobileMedia proceeding. Western supports the relief granted to MobileMedia in the Stay Order. Western seeks relief only from paragraph 18 which, by its overbreadth, has ensnared Western, which is neither controlled by the potential wrongdoers in the MobileMedia case nor involved in any way in that alleged wrongdoing, in a ten month application processing freeze. Western has more than 100 applications for new or expanded cellular, PCS and paging facilities caught in the freeze, including a major acquisition.

Hellman & Friedman Capital Partners II, L.P. and certain affiliates (together "Hellman & Friedman") and H&F Mobile Media Partners hold a 52% voting interest in MobileMedia. Hellman & Friedman holds a non-controlling ownership interest in Western of approximately 36%, which entitles it to vote approximately 45% of Western's voting shares. Even if its ownership interest increased, Hellman & Friedman is contractually limited in all cases to no greater than a 49.9% aggregate voting interest in Western. Neither Hellman & Friedman nor Messrs. Bunce and Cohen, who represent its interests as two of six directors on Western's Board (and who are also directors on MobileMedia's Board), control Western or its licensee subsidiaries or are involved in their day-to-day operations. Messrs. Bunce and Cohen are not officers or senior managers of Western or its subsidiaries, and there are no allegations pending that Hellman & Friedman or Messrs. Bunce and Cohen have ever done anything within Western that is improper. Moreover, these individuals play no role within Western in connection with application filings or reports to the Commission, i.e. the kind of activity which was the focus of the MobileMedia proceeding.

Western satisfied all reporting obligations with respect to the Hellman & Friedman interests and the MobileMedia matter, and until imposition of the freeze, the Commission routinely granted Western subsidiary applications even after such reporting. These include 95 D and E Block PCS applications granted between the date of the HDO and the Stay Order for which Western paid the Treasury approximately \$62 million dollars. The fact that the MobileMedia proceeding was placed on hold did not suddenly render Western's qualifications suspect. The Commission's indiscriminate freeze will adversely affect Western's economic interests by threatening its ability to raise public and private financing. The freeze also harms innocent parties with whom Western transacts business and the public.

Under its Grayson policy, when the Commission designates one or more of a multiple owner's applications or licenses for hearing on grounds of misconduct, it must decide whether "uninvolved" stations or licenses of the multiple owner should also be designated. This must be done by carefully balancing the public's interest in continuity and expansion of service (including the free transferability of licenses) with the Commission's own interest in deterrence. To the extent that Hellman & Friedman's interests in "uninvolved" applications or licenses of Western were a matter of concern, the Grayson policy required the Commission either to designate such applications or licenses for hearing at the time of the HDO, or to allow them to be freely processed or transferred. The Commission did not designate such applications or licenses for hearing or otherwise restrict them at the time of the HDO, and then proceeded to freeze Western's applications two months later. Such a failure to adhere to policy is particularly egregious in Western's case, where the Commission, after Western's full disclosure of the MobileMedia matter, has repeatedly found Western to be fully qualified to be a licensee, and where its frozen applications are primarily for new or expanded

cellular and PCS facilities, services in which the Commission's overarching goal has been the acceleration of seamless national coverage and the advent of cellular/PCS competition. Furthermore, it is inherent in the Grayson policy that should the MobileMedia proceeding or any other source of information unearth evidence of wrongdoing decisionally relevant to Western's qualifications, then the Commission could take appropriate action at that time.

Where an attributable interest holder is subject to an investigation of FCC-related misconduct, the Commission employs a control or involvement within the course of their employment test to assess the impact upon the potentially affected licensee or applicant. Where, as here, a licensee has previously been found qualified and there is no substantial question of fact regarding the licensee's complicity in potential misconduct of non-controlling attributable interest holders who are uninvolved in the licensee's day-to-day operations, the Commission may use a bifurcated process to sever its evaluation of any application involving the licensee from its investigation into the potential wrongdoing of the pertinent individuals.

The Commission has ample grounds to lift the freeze in its entirety. At a minimum, however, it should immediately modify or clarify paragraph 18 to allow "uninvolved" licensees, such as Western's subsidiaries, to have their applications granted prior to resolution of the wrongdoing issue as it pertains to any individual on the Bureau's list, provided that the attributable interest holder can demonstrate that such individual does not have de jure or de facto control of the licensee and is not involved in the licensee's day-to-day operations.

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To: The Commission

**EMERGENCY PETITION FOR LIMITED
RECONSIDERATION OR CLARIFICATION**

Western Wireless Corporation ("Western"), by its attorneys and pursuant to Section 1.106(b)(1) of the Commission's Rules, 47 C.F.R. §1.106(b)(1), hereby petitions for limited reconsideration or clarification of the Commission's order in MobileMedia Corporation, FCC 97-197 (rel. June 6, 1997) ("Stay Order"), which, among other things, stayed the hearing designation order ("HDO")^{1/} in the above-captioned proceeding. In support of this petition, the following is respectfully shown:

I. INTRODUCTORY STATEMENT

1. As described more fully below, Western's interests have been severely adversely affected by the provisions of paragraph 18 of the Stay Order. If not immediately modified or clarified as to Western, paragraph 18 threatens to inflict substantial economic harm upon Western and its shareholders, and impair the company's ability to continue its rapid growth and provision of quality services to the public. Western supports the relief granted to MobileMedia Corporation ("MobileMedia") and innocent creditors in the Stay Order. Indeed, among such creditors are lending institutions that provide vital capital to Western. Rather, Western, which is neither controlled by

^{1/} See MobileMedia Corporation, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity For Hearing For Forfeiture, FCC 97-124 (April 8, 1997).

potential wrongdoers in the MobileMedia case nor involved in any way in the alleged wrongdoing, only seeks relief from paragraph 18 which, by its overbreadth, has unjustly ensnared the company in a ten month application processing freeze and placed its business at risk.

2. The Commission designated the licenses of MobileMedia, the second largest paging company in the United States, for a revocation hearing after MobileMedia disclosed on October 15, 1996, the results of an internal investigation showing that it had filed a large number of false notifications on FCC Form 489 and a large number of defective "40-Mile Rule" applications.^{2/} The HDO was reported in the Federal Register on May 12, 1997. Western was not named as a party in the HDO and it did not intervene in the proceeding. Until June 6, 1997, at which point the hearing had already been stayed, there had not been any intimation in any order in the MobileMedia case that Western's interests were adversely implicated. The first formal evidence of that adverse impact became apparent on June 27, 1997 when, in an order granting numerous PCS applications of other carriers, the Wireless Telecommunications Bureau deliberately withheld action on Western's otherwise grantable D and E Block PCS applications pursuant to paragraph 18 of the Stay Order. See Memorandum Opinion and Order, DA 97-1345 (June 27, 1997), at 2, n.1 ("June 27 MO&O").^{3/}

^{2/} See HDO.

^{3/} Counsel for Western first became aware of the Commission's freeze on the grant of its applications on an informal basis three days prior to the release of the Commission's Stay Order, while inquiring about the status of a pending paging application. Since that time, the Commission has granted five point-to-point microwave applications of Western's subsidiary, WWC Holding Co., Inc. ("WWC"). See Public Notice, Report No. 1941, rel. June 17, 1997, FCC File Nos. 9700319 and 9700320; see also Public Notice, Report No. 1942, rel. June 24, 1997, FCC File Nos. 9608791, 9608792 and 9608793. In addition, the Commission has granted two Phase II Unserved Area cellular applications of WWC and another Western subsidiary, GCC License Corporation. See Public Notice, Report No. CL-97-67, rel. June 27, 1997, FCC File Nos. 02232-CL-P2-97 and 02256-CL-P2-97. In light of the June 27 MO&O, it appears that these earlier actions were inadvertent.

Included among these frozen applications are PCS proposals vital to filling out the national GSM network.

3. Western acknowledges that the wrongdoing in the MobileMedia case is extremely serious. Moreover, it recognizes that in the face of such wrongdoing, the Commission must utilize processing procedures that balance the public's interest in continuity and expansion of service (including the free transferability of licenses) with its own interest in deterrence. Under its so-called Grayson policy,^{4/} the Commission already has well established procedures to accomplish this aim. Paragraph 18, however, is directly inconsistent with Grayson procedures and does not reflect the careful balancing of interests that is required. Such a failure is particularly egregious in Western's case, where the Commission, after Western's full disclosure of the MobileMedia matter, has repeatedly found Western to be fully qualified to be a licensee, and where its frozen applications are primarily for new or expanded cellular and PCS facilities, services in which the Commission's overarching goal has been the acceleration of seamless national coverage^{5/} and the advent of cellular/PCS competition.^{6/}

^{4/} See Grayson Enterprises, Inc., 79 FCC 2d 936 (1980) (as modified by Commission Announces Modification of Grayson Enterprises Policy on Transferability of Broadcast Licenses, 53 Rad. Reg. 2d (P&F) 126 (1983) ("Grayson Modification")). See also Little Rock Radio Telephone Co., 89 FCC 2d 400, 409-410 (1982) (applying the Grayson policy to the former Domestic Public Land Mobile Radio Service).

^{5/} See Amendment of Part 22 of the Commission's Rules Relating to License Renewals in the Domestic Public Cellular Radio Service, Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 2834, 2836-2837 (1993) ("Cellular License Renewals (Reconsideration)") (holding that renewal expectancies are necessary to encourage continuing investment and stimulate licensees to build out their systems and ensure quality service), further recon. granted on other grounds, 9 FCC Rcd 4487 (1994).

^{6/} See Deferral of Licensing of MTA Commercial Broadband PCS, 11 FCC Rcd 3214, 3227-3228 (1995).

4. Under paragraph 18, by June 16, 1997, the Chief of the Wireless Telecommunications Bureau was required to compile a list of all former and current officers, directors and senior managers of MobileMedia (regardless of whether or not they are suspected of wrongdoing) and provide that list to all Bureaus and Offices and to the Chairman and all Commissioners. Because of some apparent confusion as to those individuals and entities properly within the ambit of paragraph 18, a revised and corrected list was not disseminated by the Bureau until June 25, 1997. Pursuant to paragraph 18, any licensee's application in which persons on the list hold an "attributable interest" will be subject to the freeze. The term "attributable interest" is not defined. Any such application "shall not be granted without resolution of [the MobileMedia wrong doing] issue as it pertains to that individual [holding the attributable interest]."^{7/} The resolution for each such individual may take place either in the context of the MobileMedia hearing, if the stay is ultimately lifted, or in the context of a specific collateral application.^{8/} By making the mere appearance of an attributable interest holder's name on the Bureau's list the trip wire for deferral, the Commission has improperly substituted benchmarks relevant to application reporting obligations for the balancing of interests analysis necessary for application processing.

5. Western does not dispute its reporting obligation in connection with the MobileMedia case. Indeed, Western amended pending applications to reflect the ongoing proceedings months before the Bureau's list was made available. Because of certain common non-controlling owners and directors whose interests are reportable under Parts 22 and 24 of the Commission's Rules,

^{7/} Stay Order at ¶18.

^{8/} Id.

following the Commission's first report of adverse action to MobileMedia in January of this year,^{9/} and again upon release of the HDO in April, Western reported the MobileMedia matter, including the Hellman & Friedman ownership connection.^{10/} Western does dispute, however, that the June 6 stay of the MobileMedia hearing, standing alone, should have occasioned any different treatment of its applications, which up until then were being granted routinely.

6. MobileMedia is a publicly traded company. Approximately 30% of its Class A common stock and 99% of its Class B common stock (together constituting approximately 52% of the voting interest) is held by Hellman & Friedman Capital Partners II, L.P. and certain affiliates (namely H&F Orchard Partners, L.P. and H&F International Partners, L.P.) (together, "Hellman & Friedman") and H&F MobileMedia Partners. Hellman & Friedman manages approximately \$875 million of capital from distinguished public and private pension funds, endowments, and foundations. Significant investors include the retirement systems of California, New York, and Virginia; the pension funds of IBM, AT&T, and NYNEX; the endowments of Yale and Stanford Universities; and the Ford Foundation.

7. Hellman & Friedman holds a 35.9% equity interest in Western's issued and outstanding stock (comprised of 0% of Class A common stock and 45.6% of Class B common stock). This amounts to approximately 45% of Western's voting interests.^{11/} By contract, Hellman & Friedman

^{9/} See Public Notice, Report No. DA 97-78, Jan. 13, 1997 (dismissing certain MobileMedia paging applications as defective and terminating certain authorizations).

^{10/} See, e.g., Amendment to Application of Western Paging I Corporation (FCC File No. 132765-ML-96) filed February 14, 1997; see also Amendment to Phase II Application of GCC License Corporation (FCC File No. 01239-CL-P2-97) filed February 13, 1997, and Phase II Application of WWC Holding Co., Inc. filed April 24, 1997 (FCC File No. 02392-CL-P-(2)-97) (reporting release of the HDO).

^{11/} Class B shares have a voting power ratio to Class A shares of 10:1.

and its affiliates are limited in all cases to no greater than a 49.9% aggregate voting interest in Western, even if Hellman & Friedman should hold shares of capital stock having in excess of 49.9% voting power. Two principals of Hellman & Friedman who are directors of MobileMedia, namely John L. Bunce, Jr. and Mitchell R. Cohen, sit on Western's Board of Directors and comprise one third of that Board. These two individuals are not officers or senior managers of Western, nor are they officers or senior managers or directors of any of Western's operating subsidiaries, which hold all of the company's FCC licenses. The directors of the subsidiaries are all officers of Western. Messrs. Bunce and Cohen are not involved in the day-to-day operations of Western or any of its licensed subsidiaries, nor are they involved in supervising the preparation or filing of any Western licensee's applications or reports to the Commission.

8. To appreciate the arbitrary and capricious nature of the freeze, it is important to note that there is no allegation pending that Hellman & Friedman or Messrs. Bunce and Cohen have ever done anything within Western^{12/} that is improper or that could in any way affect Western's qualifications to be a licensee. In fact, until June 6, 1997, the Commission had routinely been granting applications of Western's subsidiaries, thereby reaffirming their continued qualifications to be a licensee.^{13/} Included among these applications were 95 D and E Block broadband PCS licenses granted to

^{12/} Even within MobileMedia, based on the extensive investigations and depositions conducted by the Wireless Bureau to date, Western is aware of no allegations that any Hellman & Friedman principals participated in, condoned, or were even cognizant of the wrongdoing that was the focus of MobileMedia's voluntary October 15, 1996 Report to the Commission. To the contrary, Western understands that those Hellman & Friedman principals took immediate steps to direct counsel to investigate and fully report the wrongdoing.

^{13/} See, e.g., Point-to-Point Microwave Applications of WWC Holding Co., Inc. (FCC File Nos. 9608520-23 and 9608516-18) granted June 3, 1997.

wholly-owned subsidiaries of Western on April 28, 1997,^{14/} for which Western has paid the United States Treasury a total of \$62,651,557. This is in addition to other sums Western has already paid to the Treasury, including approximately \$144 million dollars paid for PCS licenses won in the A and B Block auctions. Now, with more than 100 applications pending, including a major acquisition and proposed new and expanded facilities in paging, cellular and PCS, Western suddenly finds that the burden of adjudicating MobileMedia's wrongdoing has shifted from MobileMedia in the hearing room to its own applications on the processing line. Ironically, this unusual turn of events has resulted from the Commission's application of a Second Thursday^{15/} procedure to protect innocent creditors which, if successfully implemented with appropriate safeguards, contemplates never adjudicating MobileMedia's wrongdoing at all.

9. As shown below, not only are the procedures set in motion by paragraph 18 grossly unfair to Western and its innocent shareholders, they harm both innocent parties with whom Western transacts business and the public. Moreover, paragraph 18 is at variance with the Commission's own well established procedures concerning hearing designations of multiple owners whose interests include "uninvolved" licensees. The Commission has repeatedly declined to impede processing applications of "uninvolved" licensees based on alleged FCC infractions of non-controlling interest holders occurring outside of such "uninvolved" licensees. The Commission has a wide range of far more precise tools available to assure compliance and deterrence than an indiscriminate processing freeze. These include show cause hearings, fines, orders to cease and desist and for divestiture, if necessary, should such non-controlling interest holders ultimately be found to have engaged in

^{14/} See Public Notice, Report No. DA 97-883, April 28, 1997.

^{15/} See Second Thursday Corp., 22 FCC 2d 515 (1970), recon. granted, 25 FCC 2d 112 (1970).

misconduct, or if the Commission has reason to believe they have engaged in misconduct. They also include designation for hearing of the potential wrongdoer's applications or licenses, if any.

10. Under the outstanding precedents discussed below, the Commission has ample grounds to lift the freeze in its entirety. At a minimum, however, it should immediately modify or clarify paragraph 18 to limit the freeze on processing to those applications in which the attributable interest holder appearing on the Wireless Bureau's list has de jure or de facto control or is involved in the licensee's day-to-day operations in the course of that person's employment. As so modified or clarified, "uninvolved" licensees, such as Western's subsidiaries, should be able to have their applications granted prior to resolution of the wrongdoing issue as it pertains to any individual on the Bureau's list, provided they can demonstrate that such individual does not exercise control of the licensee and is not involved in the licensee's day-to-day operations in the course of employment.

II. STANDING

11. Western is a publicly traded corporation, which through its subsidiaries holds licenses nationwide for cellular radio, microwave, PCS and one-way paging facilities.^{16/} The companies' subsidiaries currently have a significant number of pending cellular, PCS, microwave and paging applications, including a major acquisition of cellular, microwave and PCS assets of Triad Cellular

^{16/} Western subsidiaries hold 75 cellular licenses and 107 PCS licenses. Western's combined cellular and PCS licenses, along with its 49% investment with Cook Inlet Region Inc. ("CIRI") and other investors as a "designated entity" licensee, cover 63 million people and 59% of the land in the continental United States. With the February 1996 launch of its Honolulu PCS system, Western became the first auction-awarded PCS licensee to commence commercial operation in the United States, and in June 1996 became the second when it initiated PCS operations in Salt Lake City. Western has since commenced commercial PCS operations in the Portland, El Paso/Albuquerque, Oklahoma City, Des Moines/Quad Cities and Denver MTAs; and on June 5, 1997, in partnership with CIRI and others, Western was part of the launch of the Tulsa C Block system, the first major market to commence commercial PCS operations under the FCC's "designated entity" program.

Corporation and its affiliates.^{17/} By imposing a freeze on Western's subsidiary applications, the Commission has adversely impacted Western's interests, while affording no viable vehicle for relief other than the as yet undefined and potentially lengthy qualification procedures of paragraph 18.^{18/} Thus, Western has standing to petition the Commission to reconsider or clarify paragraph 18 of the Stay Order as it pertains to Western.

12. Section 1.106 of the Commission's Rules allows any person whose interests are adversely affected by any action taken by the Commission to file a petition requesting reconsideration of the action taken. If the petition is filed by a person who is not a party to the proceeding, "it shall state with particularity the manner in which the person's interests are adversely affected by the action taken, and shall show good reason why it was not possible for him to participate in the earlier stages of the proceeding." 47 C.F.R. § 1.106(b)(1). As discussed below, paragraph 18 of the Stay Order violated the Commission's well established Grayson policy, which requires the Commission, at the time of the hearing designation, to announce any limitation on stations or licenses other than those directly implicated in the wrongdoing.^{19/} Here, the Commission waited to impose the freeze until two months after release of the HDO in a separate order granting relief to the acknowledged wrongdoer. Western quite properly relied on the policy articulated in Grayson and its progeny and did not seek to become a party to the MobileMedia hearing.

^{17/} See Public Notice, Report No. LB-97-36, released May 30, 1997; and Public Notice, Report No. 1938, released May 27, 1997.

^{18/} Preliminary discussions with the Wireless Bureau have shown that there are significantly divergent views within the Bureau as to the type of qualification procedures available under paragraph 18. Moreover, the Commission's broadened definition of "parties" under the newly effective ex parte rules has resulted in unwieldy multi-party conferences just to discuss routine processing issues. These circumstances do not bode well for a speedy lifting of the freeze within the confines of paragraph 18.

^{19/} Grayson Modification, 53 Rad. Reg. 2d (P&F) at 127.

13. The Commission has previously noted in connection with the cellular industry that vagaries of the licensing process may compromise the environment for investment and finance, and that care should be taken to remove needless uncertainties. See Cellular License Renewals (Reconsideration) at 2839, ¶15. This principle has become even more compelling in the wireless industry with the advent of PCS competition, and the recent upheavals in wireless stocks associated with PCS defaults, bankruptcies and debt restructuring efforts.^{20/} In analogous contexts in the past, the Commission has been sensitive to the harm that its actions might have upon public companies and unoffending shareholders when attempting to deal with the potential wrongdoing of noncontrolling investors. See Pinelands, Inc., 7 FCC Rcd. 6058, 6067 and 6068 (Comm. Duggan concurring) (1992), appeal dismissed sub nom. Garden State Broadcasting Ltd. Partnership v. FCC, 996 F.2d 386 (D.C. Cir. 1993). Accordingly, where the licensee itself has previously been found qualified and there is no substantial question of fact regarding the licensee's complicity in alleged misconduct of a non-controlling attributable owner, the Commission has used a bifurcated process to sever its evaluation of any transfer application of the licensee from its investigation into the potential wrongdoing of the investor. Id., see also BTMI Inc., 9 FCC Rcd 2856, 2858 (1994). As a party aggrieved by the Commission's departure from the Grayson policy in this case, Western has standing to protect its interests and remove uncertainty concerning its status in financial markets at the earliest possible date.

14. By not providing Western notice in the HDO that its applications would be designated for hearing or otherwise adversely affected by a proceeding involving MobileMedia's wrongdoing, the Commission denied Western's due process rights under the Grayson policy. As a published

^{20/} See e.g. Public Notice, WT Docket 97-82, DA 97-1267, released June 17, 1997 (announcing a public forum to discuss possible PCS debt restructuring).

policy, Western had every right to rely on it under Section 552(a) of the Administrative Procedure Act, 5 U.S.C. §552(a), and Section 0.445(e) of the Commission Rules, 47 C.F.R. §0.445(e). See Gardner v. FCC, 530 F.2d 1086, 1091 (D.C. Cir. 1976) (participants in an agency action have an undeniable interest in seeing to it that the procedural rights guaranteed them by law are respected). Western has standing to petition the Commission to reconsider that portion of the Stay Order that denies Western its procedural rights.^{21/}

III. PARAGRAPH 18 OF THE STAY ORDER IS DIRECTLY INCONSISTENT WITH THE PUBLIC INTEREST OBJECTIVES UNDERLYING THE COMMISSION'S GRAYSON POLICY

15. Under the Commission's original Grayson policy announced in 1979, when a multiple owner of stations had one station designated for hearing on grounds of character qualifications, the Commission determined at the time of designation whether there was "substantial likelihood" that the allegations being considered bore upon the prospective operation of the other stations.^{22/} If the finding was in the affirmative, the Commission could limit the transferability of stations not involved in the alleged wrongdoing by an express statement, by a conditional grant of a renewal application or by designating the other licenses for hearing. If no such limitation was expressed, the licensee

^{21/} Western recognizes that normally petitions for reconsideration of interlocutory orders pertaining to a hearing are not entertained. 47 C.F.R. §1.106(a)(1). However, the Stay Order itself arose from an unusual departure from a similar rule prohibiting interlocutory appeals, namely 47 C.F.R. §301(b). Id. at 3. While a strong argument could be made that paragraph 18 of the Stay Order substantially amended the HDO, see 47 C.F.R. §1.223(a), intervention at this juncture in a stayed proceeding does not appear to be an effective avenue for redress. Though application freezes are interlocutory in nature, the Commission has in the past granted relief where warranted by the facts presented. See e.g. Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, Memorandum Opinion And Order, 12 FCC Rcd 2910 (1997) (partially granting reconsideration of a stay on processing). To the extent necessary and because of the highly unusual posture of this case, the Commission may also consider this petition as one for special relief or waiver of 47 C.F.R. §1.106(a)(1). See Stay Order at 2.

^{22/} Grayson, 79 FCC 2d at 939.

was free to assign or transfer the uninvolved stations.^{23/} In adopting the Grayson policy, the Commission explained that “[d]eferral of an assignment application can have an adverse impact on the community in which the station is located.”^{24/} Deferral of the assignment application may result in deterioration of service to the community because of the potential negative impact on the owner’s willingness to invest new financial resources or effort and upon the employees’ morale. Against these considerations, the Commission had to weigh its long-term interest in deterrence of wrongdoing.^{25/}

16. In applying Grayson to multiple owners, the Commission said that in order to remove uncertainty, it would “apply the same standards it has applied in the past.”^{26/} Significantly, as it relates to Western, under such standards, Western’s applications should not have been restricted, because Hellman & Friedman’s interest, though cognizable, is non-controlling and the misconduct at issue did not involve Western’s licensed stations. See George A. Mayoral, 29 Rad. Reg. 2d (P&F) 489 (1974).^{27/}

17. In 1983 the Commission modified the Grayson policy, but not as it pertained to non-controlling uninvolved interest holders, such as Hellman & Friedman. It decided that the public and all parties concerned are best served by “either designat[ing] the owners’s other stations for a renewal

^{23/} Id.

^{24/} Id.

^{25/} Id. (rejecting ad hoc adjudication regarding uninvolved stations in favor of a ruling at the time of initial designation for hearing).

^{26/} Id. at 940.

^{27/} See also Stephen F. Sewell, Assignment and Transfers of Control of FCC Authorizations Under Section 310(d) of the Communications Act of 1934, 43 Fed. Comm. L.J. 277, 344 (1991). The Commission has performed Grayson-like analyses with respect to multiple owners in cellular decisions where such an owner has a sizable but non-controlling interest. See Cellular System One of Tulsa, 102 FCC 2d 86, 89 (1985).

hearing or permit[ting] them to be transferred freely . . .^{28/} In the absence of language in the hearing designation order restricting the transfer or assignment of multiple owner's uninvolved stations, the Commission will ordinarily allow sales or acquisitions to take place without conditions being imposed.^{29/} This change did not affect the Commission's discretion to take action against the owner's other stations if the record after hearing discloses conduct more serious than initially believed to be the case.^{30/}

18. When the Commission decided to retain the modified Grayson policy in its 1986 Character Policy Statement, it made it clear that the concern underlying Grayson was the impact of misconduct at one station upon "commonly controlled stations[]."^{31/} This is not to suggest that there may not be circumstances where the conduct of an attributable but non-controlling shareholder may bear upon the qualifications of a licensee, but to do so, there must be at least some factual basis to conclude that the alleged misconduct of the shareholder occurred within that licensee or that the individual is involved in the management or day-to-day operations.^{32/} Even where a multiple owner

^{28/} Grayson Modification, 53 Rad. Reg. 2d at 127, see also Trinity Broadcasting of Florida, 9 FCC Rcd 2567, 2568 (1994).

^{29/} See Policy Regarding Character Qualifications in Broadcast Licensing, 102 FCC 2d 1179, 1224-25 (1986) ("Character Policy Statement"), on recon; 1 FCC Rcd 421, appeal dismissed sub nom. National Association of Better Broadcasting v. FCC, No. 86-1179 (D.C. Cir. June 11, 1987); see also Metroplex Communications of Florida, Inc., 96 FCC 2d 1090 (1984) (allowing a multiple owner already in a qualifications hearing to acquire new stations).

^{30/} Grayson Modification, 53 Rad. Reg. 2d (P&F) at 127.

^{31/} Character Policy Statement, 102 FCC 2d at 1220; see also George A. Mayoral, 29 Rad. Reg. 2d (P&F) 489 (1974).

^{32/} See Pinelands, 7 FCC Rcd at 6065. See also Request For Relief from the Imposition of Conditions filed by Telephone and Data Systems, Inc., Order, 11 FCC Rcd 6973, 6974, ¶3 (1995) (lifting character condition pertaining to FCC-related misconduct from existing and newly created subsidiaries in which principals of the alleged wrongdoer were not involved); see also Westinghouse Broadcasting Corp., Inc., 75 FCC 2d 736, 739-740 (1980).

exercises such management prerogatives or control, "there should be no presumption that misconduct at one station is necessarily predictive of the operation of the licensee's other stations."^{33/} A case-by-case analysis is required, and the Commission confirmed that the time to do such an analysis is at the time of hearing designation.^{34/}

19. The Commission has applied the Grayson policy to wireless services, and has found that the determination of whether to restrict applications concerning "uninvolved" stations at the time of designation warrants a "careful review of the facts"^{35/} In some cases, where exigent circumstances do not permit the Commission to determine the impact of adjudicated (but non-final) misconduct on a related party's application, then at the time such related party's application is designated for hearing, the Commission may order that any grant to that party shall be conditioned upon the outcome of the already pending proceeding.^{36/} In this case, of course, there has been no adjudication of misconduct by any attributable interest holder in Western, and conditioning would be wholly inappropriate.

^{33/} Character Policy Statement at 1223, ¶92.

^{34/} Id. at 1224-1225.

^{35/} See Little Rock Radio Telephone Co., 89 FCC 2d 400, 409-410 (1982) (applying the Grayson policy and its balancing test to facilities licensed in the Domestic Public Land Mobile Radio Service), see also Cellular System One of Tulsa, 102 FCC 2d 86, 89, ¶7 (1985) (applying a Grayson-like balancing analysis in removing a character license condition pertaining to a non-controlling 45% partner).

^{36/} See Advanced Mobilephone Service, Inc., 91 FCC 2d 512, 520 (1982) (directing the ALJ in a cellular comparative hearing to condition any grant to a party potentially implicated by the adjudicated wrongdoing of its parent company in a paging scam on the final outcome of that proceeding).

20. The HDO imposed no limitations on collateral licensees, such as Western, nor did the Commission assert any exigent need for conditioning applications of such licensees.^{37/} In fact, under Grayson it can be reasonably assumed that the Commission performed a careful balancing analysis at the time of the HDO, and therefore refrained from imposing restrictions or conditions on Western's applications. There is, in fact, no link between even a potential (let alone an adjudicated) wrongdoer from MobileMedia and the day-to-day management and control of Western's licensed subsidiaries, nor is there any allegation of related wrongdoing by these persons within Western. Thus the Commission could not find a "substantial likelihood" that the possible conduct of the attributable interest holders could bear upon Western's qualifications. The imposition of conditions on an innocent licensee under these circumstances, particularly for a public company, could well lead to detrimental consequences, and there would be no countervailing public interest benefit.

21. The Commission's stay of the HDO to apply Second Thursday procedures in this case should not have occasioned a departure from Grayson with respect to "uninvolved" stations or licensees. The non-controlling licensed interests of Hellman & Friedman in Western were not even discussed in the HDO, let alone conditioned. The only major change in Hellman & Friedman's licensed interests between April 8 and June 6, 1997 was the Commission's grant to Western of 95 PCS licenses, for which Western paid approximately \$62 million dollars. That hardly constituted a ground to take a second look.

22. Although the stay on Western's applications is inappropriate, if facts unearthed in the MobileMedia proceeding or elsewhere indicate that Western's applications should be more closely examined in connection with the attributable interest holders, the Commission may certainly do so at that time. It is well settled that the Commission retains the discretion to take action against the

^{37/} Contrast Advanced Mobilephone Service, Inc., supra.

“uninvolved” stations at a later date should such action prove warranted in light of the final decision in the original hearing proceeding.^{38/} In a recent cellular case, where there was a substantial and material question of fact as to whether a multiple owner’s officer had testified truthfully in an FCC hearing, the Commission placed all potentially affected licensees on notice following that hearing that outstanding character issues may be revisited in future proceedings “where the other interests of [potential wrongdoers] have decisional significance.”^{39/} Unlike these customary procedures, which are deliberative in nature, the Commission in this case froze processing of a broad range of applications without any analysis as to whether the alleged wrongdoing, or the attributable interests of the potential wrongdoers, are of decisional significance to the applications of such other licensees. Indeed, Western alone, having no issue of wrongdoing designated against it or against any of the parties responsible for its day-to-day operations, has more than 100 applications pending,^{40/} including a major acquisition, and approximately 100 more about to be filed. These applications, perhaps unintentionally, have become ensnared by paragraph 18 of the Stay Order.^{41/}

23. Because the freeze imposed by paragraph 18 of the Stay Order violates the Commission’s Grayson policy and breeds precisely the type of uncertainty and ad hoc adjudication that that policy was designed to avoid, the Commission must reconsider its action. The Commission

^{38/} See Grayson Modification, 53 Rad. Reg. 2d (P&F) at 127.

^{39/} See LaStar Cellular Telephone Co., 7 FCC Rcd 3762, 3767 n.3, vacated and remanded on other grounds sub nom. Telephone and Data Systems Inc. v. FCC, 19 F.3d 655 (D.C. Cir. 1994), on remand, 9 FCC Rcd 7108, 7111 (1994).

^{40/} Any contested applications would, of course, be processed in the routine manner for such applications.

^{41/} Already Western has begun to feel the sting of paragraph 18 in the withholding of action on its otherwise grantable PCS applications. See Memorandum Opinion and Order, DA 97-1345 (Wir. Tel. Bur. June 27, 1997) at 2, n.1.

has better tools at its disposal to assure that investigations are aimed at potential wrongdoers and not innocent licensees.

IV. WHERE AN ATTRIBUTABLE INTEREST HOLDER IS SUBJECT TO AN INVESTIGATION OF FCC-RELATED MISCONDUCT, THE COMMISSION EMPLOYS A CONTROL OR INVOLVEMENT IN THE COURSE OF EMPLOYMENT TEST TO ASSESS THE IMPACT UPON THE POTENTIALLY AFFECTED LICENSEE OR APPLICANT

24. To operate a facility in the public interest pursuant to Section 309 of the Act, 47 U.S.C. §309, a licensee must have certain basic qualifications. See Character Policy Statement. Although the standards adopted by the Commission in the Character Policy Statement were designed to apply to broadcasters, they have been used for guidance in cases involving common carrier and wireless services.^{42/} In the Character Policy Statement, the Commission detailed the relevance of a character examination to the licensing process and identified the conduct which is pertinent to such an analysis. As a threshold matter, "wrongdoing by corporate managers who are also controlling stockholders will be treated as though the individuals involved were sole proprietors or partners."^{43/} As the nexus between the alleged wrongdoer and the corporate licensee becomes something less than control, a determination of how to treat misconduct (both FCC-related^{44/} and non-FCC related) "is

^{42/} See, e.g., MCI Telecommunications, 3 FCC Rcd 509, 515 n.14 (1988) (standards developed in the broadcast context can provide guidance in the common carrier area as well); see also David A. Bayer, 71 Rad. Reg. 2d (P&F) 308, 311 (1992) (analyzing alleged misconduct by a cellular licensee under the Character Policy Statement); and Cellular License Renewals (Reconsideration).

^{43/} Character Policy Statement at 1218.

^{44/} FCC-related misconduct describes activity which violates the Communications Act of 1934, as amended or a specific Commission rule or policy. Character Policy Statement at 1183 n.11.

a more complex task."^{45/}

25. Generally, the Commission has determined that when individuals charged with wrongdoing hold a position or an ownership interest within a corporate licensee that is non-controlling, it would use its attribution standards under the broadcast multiple ownership rules to determine whether the level of participation warranted consideration.^{46/} Under the broadcast multiple ownership rules,^{47/} a stock interest of the size of Hellman & Friedman in a licensee would be deemed attributable, as would holding the position of a director, as in the case of Messrs. Bunce and Cohen. Though paragraph 18 of the Stay Order did not define "attributable interest," Western assumes for purposes of this analysis that the interests of Hellman & Friedman and Messrs. Bunce and Cohen are, in fact, each attributable. But the analysis does not stop there. Attribution simply means that these relationships required disclosure, and any new facts potentially bearing on the qualifications of the interest holders or the licensee had to be reported. In this case, Western routinely disclosed the Hellman & Friedman relationships in its pending and new applications and it further disclosed the ongoing MobileMedia proceedings.

26. As previously noted, neither Mr. Bunce nor Mr. Cohen, nor anyone else from Hellman & Friedman, is an officer or director of Western's licensed subsidiaries. Moreover, none of these persons is involved in the day-to-day operations of such subsidiaries. In determining whether individual FCC-related misconduct should be considered in a parent-subsidiary relationship, the Commission has said that irrespective of attribution, the determining factors should be whether the individuals associated with the parent are "also involved in subsidiary operations" and whether the

^{45/} Id. at 1217-18.

^{46/} Id. at 1205-06.

^{47/} See 47 C.F.R. §73.3555.

misconduct “occurr[ed] in the course of their employment (whether or not involving a . . . subsidiary)”^{48/} As between related subsidiaries, “FCC-related misconduct will be treated in the same fashion as that involving the parent-subsidary relationship.”^{49/} In the wireless services, the Commission has found the involvement of principals of the alleged wrongdoer in the subsidiary licensee’s day-to-day operations to be of pivotal significance.^{50/} Thus, if Hellman & Friedman or Messrs. Bunce and Cohen were involved in the day-to-day operations of any of Western’s licensed subsidiaries — which they are not — and they were alleged to have engaged in FCC-related misconduct in the course of their employment with Western — a circumstance also not present — then the alleged misconduct would “warrant[] at least some exploration.”^{51/} The same would be true with respect to all of Western’s licensed subsidiaries, provided the above-referenced individuals or investors were involved in any of the subsidiaries’ day-to-day operations and the wrongdoing occurred in the course of their employment with Western or any such subsidiary. In short, none of the circumstances warranting such further exploration are present in this case. Accordingly, following full disclosure by the pertinent Western licensee subsidiaries of these ownership interests and directorships (and, since January 13, 1997, the Commission’s actions related to MobileMedia), the Commission has repeatedly and properly granted their applications. The Commission’s break from that approach in paragraph 18 of the Stay Order flies in the face of Commission precedent, at enormous cost to Western.

^{48/} Character Policy Statement at 1219.

^{49/} Id. at 1220.

^{50/} See Request for Relief from the Imposition of Conditions filed by Telephone and Data Systems, Inc., 10 FCC Rcd 6973, 6974 (1995).

^{51/} Character Policy Statement at 1219-21.

27. The fact is, no one has ever alleged wrongdoing by Western in connection with any of the aforementioned attributable interest holders. These individuals are only on the Bureau's list as potential wrongdoers within a different licensee. There is no basis under the Character Policy Statement or any concept of due process for guilt of licensees by association. Even if one or more of these interest holders on the list is ultimately found to be unqualified, the Commission has stated in cellular decisions that it has never held that a licensee is disqualified by virtue of a finding that one or more of its non-controlling owners is unqualified.^{52/} Even while it was active, the MobileMedia proceeding did not impose a cloud on the qualifications of Western or its other shareholders, all of whom have been found unconditionally qualified to hold cellular, PCS and paging licenses.^{53/} The fact that the MobileMedia case was placed on hold did not mean that Western's qualifications suddenly became suspect.

28. When the Commission authorized Second Thursday procedures in MobileMedia's case, it "balance[d] the possible injury to the Commission's regulatory authority that might flow from a wrongdoer's realization of benefits against the public interest in innocent creditors' recovery from the sale and assignment of the license to a qualified party. [citing La Rose v. FCC, 494 F.2d 1145, 1149 (D.C. Cir. 1974)]."^{54/} In addition, it noted that the Wireless Bureau had terminated more than 250 MobileMedia authorizations and dismissed nearly 100 applications affected by

^{52/} See Charisma Communications Corp. of the Southwest, 58 Rad. Reg. 2d (P&F) 263, 264 n.4 (1982); see also Ellis Thompson Corp., 64 Rad. Reg. 2d (P&F) 1709, 1711 (Mob. Ser. Div. 1988).

^{53/} See Charisma Communications Corp. of the Southwest, 58 Rad. Reg. 2d (P&F) at 264; see also Pinelands, Inc., 7 FCC Rcd 6058, 6067-6068 (1992).

^{54/} Stay Order at ¶13.